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NOV 13 2006
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November 8, 2006

Jim La Spina
Water Quality Program
Washington State Department of Ecology
PO Box 47696
Olympia, WA 98504-7600

RE: Comments on Preliminary Draft NPDES Industrial Stormwater Permit

Dear Mr. La Spina:

Thank you for the opportunity to participate in the permit advisory committee and to comment on the preliminary draft NPDES industrial stormwater permit issued on October 5, 2006. We commend you on your effort to revise the permit so that it is better aligned with current technical information and issues that have arisen during revisions to the municipal and construction stormwater general permits.

Some primary concerns we have are:

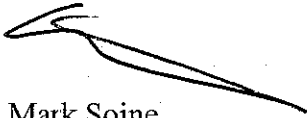
- provisions that would improperly modify permit conditions by invoking documents written after permit issuance
- the inability of a permittee to appeal such provisions;
- inappropriate transfer of legal responsibility from Ecology to the permittee; and
- vague or undefined terms, and unclear requirement language.

Many of these concerns have been discussed, and in some cases resolved, in the work on the construction and municipal stormwater general permits, and we recommend that you discuss our comments with other Ecology staff, including Bill Moore and Ann Wessel. We are confident that these issues can be resolved in the coming months.

Jim La Spina
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The following pages contain detailed comments on the permit and related documents referenced therein. If you would like to discuss our comments further, please contact Bill Leif at (425) 388-3148.

Sincerely,



Mark Soine
Deputy Executive

cc: Steve Thomsen, P.E. Director, Department of Public Works
Craig Ladiser Director, Dept. of Planning and Development Services
Karen Kerwin, P.E. Director, PW - Surface Water Management Division
Bill Leif, P.E. PW - Surface Water Management Division

COMMENTS ON GENERAL CONDITIONS

S1 - Permit Coverage

COMMENT 1

Define the term "facility" as used throughout the permit. We recommend the following definition: "The legal parcel, or set of contiguous legal parcels, on which the activities regulated under permit occur."

Justification: The term is undefined in the permit but is used extensively. A definition of the term "facility" is critical to determine the scope of permit coverage when a permittee conducts multiple activities, only some of which are regulated by the permit, on adjacent legal parcels owned by the permittee.

COMMENT 2

In S1.B.1, clearly define the term "significant contributor." The term is not defined by statute and neither the draft permit or fact sheet provide guidance to its meaning. Ecology provides no numeric standard or any other type of measurement.

Justification: A similar condition in the NPDES Construction general permit has been appealed to the Pollution Control Hearings Board. The issue on appeal is whether the undefined term is unlawfully vague because Ecology did not provide criteria about what triggers Ecology's discretionary authority to determine what actions would make someone a significant contributor. Ecology must provide the regulated community with criteria that allows them to understand what types of behaviors and/or actions would bring previously unregulated entities within the scope of the permit.

COMMENT 3

S1.D.5 states that any facility authorized to discharge stormwater under an existing NPDES individual or other general permit is categorically excluded from coverage under the industrial stormwater general permit. This would exclude all facilities owned or operated by NPDES municipal stormwater permittees. Please revise the language to state this exclusion more clearly.

COMMENT 4

S1.E.1 uses the term “site,” and the usage implies the same meaning as “facility.” We recommend changing “site” to “facility” unless there is a good reason to use the term “site,” in which case the term needs a definition that distinguishes a site from a facility. See also Comment #1.

Justification: Ensure consistency of permit terms and clarify regulatory expectations. See Comment #1.

COMMENT 5

In S1.F, define “significant levels” of pollutants. The term has not been defined in the draft permit, Appendix 2, or the Fact Sheet.

Justification: Although the term “significant levels” is used throughout the permit, it is not defined in the permit or fact sheet, nor do these documents provide guidance regarding its meaning. The term sets a threshold for permit coverage and subsequent enforcement action; thereby, Ecology must provide the regulated community information regarding what levels of pollutants are considered significant.

S2 – How To Apply

COMMENT 6

In S2.A.2, define “significant levels” of pollutants. The term has not been defined in the draft permit, Appendix 2, or the Fact Sheet.

Justification: The term is undefined in the permit but is used extensively throughout. The term sets a threshold for permit coverage and subsequent enforcement action; thereby, Ecology must provide the regulated community information regarding what levels of pollutants are considered significant.

COMMENT 7

Delete from S2.A.3(c)(ii) the requirement that an applicant must submit its SWPPP 60 days prior to commencement of stormwater discharged from the facility.

Justification: Neither the draft permit nor its accompanying Fact Sheet set forth either the legal authority or reasons that new facilities must submit their SWPPPs to Ecology with their applications for permit coverage. Ecology should provide its basis for this requirement or otherwise delete this condition from the permit.

COMMENT 8

In S2.G.1(e), replace the terms “in the written agreement” with “the Transfer of Coverage Form”.

Justification: The term was defined in S2.G.a.

S3 – Stormwater Pollution Prevention Plan (SWPPP)

COMMENT 9

Delete paragraphs S3.A.3(b) and (c).

Justification: These paragraphs establish permit requirements based on documents that do not exist, and the imposition of documents written in the future would constitute an illegal modification of permit conditions. Further, such an act would violate the rights of present and future permittees to due process of appeal, since it is impossible to appeal a condition that does not exist. Permits can be modified only through the procedures set forth in 173-226-230 WAC, which contains an appeal process (including a specific period of time within which appeals must be made). If Ecology reissues the Stormwater Manual or any other document referenced in the permit, and wants to institute the revised document as a condition in an NPDES permit, it must modify the permit in accordance with state rules. This issue has been resolved in the municipal permit development process.

As an alternative to modification of the general permit, Ecology can issue an administrative order to a permittee that requires implementation of a Stormwater Manual published subsequent to the current Manual. Such a process is implied in S3.A.9.

COMMENT 10

In S3.A.3(d), delete the phrase “this demonstration requirement” and replace it with the phrase “special condition S3.A.2.”

Justification: The phrase “this demonstration requirement” is vague, and one is left to infer that the default path of using the 2005 Ecology Stormwater Manual constitutes the “presumptive approach” for meeting the performance outcomes stated in S3.A.2. This should be explicitly stated.

COMMENT 11

In S3.A.4(e)(i), revise the sentence to state that “the Permittee shall ~~provide~~ make the SWPPP available within 14 days of receipt of a written request.”

Justification: The requestor should pay the reasonable cost of making copies of a SWPPP, as set forth in S3.A.4(e)(ii)(2). This revision should remove any possible ambiguity between the two provisions.

COMMENT 12

Delete paragraph S3.A.5.

Justification: This paragraph establishes permit requirements based on documents that do not exist, and the imposition of documents written in the future would constitute an illegal modification of permit conditions. Further, such an act would violate the rights of present and future permittees to due process of appeal, since it is impossible to appeal a condition that does not exist. Permits can be modified only through the procedures set forth in 173-226-230 WAC, which contains an appeal process (including a specific period of time within which appeals must be made). If Ecology reissues the Stormwater Manual or any other document referenced in the permit, and wants to institute the revised document as a condition in an NPDES permit, it must modify the permit in accordance with state rules. This issue has been resolved in the municipal permit development process.

As an alternative to modification of the general permit, Ecology can issue an administrative order to a permittee that requires implementation of a Stormwater Manual published subsequent to the current Manual. Such a process is implied in S3.A.9.

COMMENT 13

Delete S3.A.6(c).

Justification: This section is vague, and replicates the intent of S3.A.6(d), which clearly states the provision's intent.

COMMENT 14

In S3.A.6(f), change the phrase "enforcement action" to "enforcement action by Ecology under the provisions of Chapter 90.48 RCW."

Justification: The current language does not specify the enforcement agency or regulation under which enforcement action would take place.

COMMENT 15

Condition S3.A.9, entitled 'Compliance/Enforcement,' requires permittees to revise their SWPPP upon notification by Ecology, and to add BMPs if Ecology so directs. Issuing a Notice under RCW 90.48.120 appears appropriate for S3.A.9 a (i-ii) & b. Condition S3.A.9 c, however, may require an administrative order if Ecology requires additional BMPs. To clarify this condition, the permit should refer permittees to Condition S8.

Justification: Some actions by Ecology as described in S3.A.9 could go beyond the bounds of what can be required in a Notice.

COMMENT 16

Clarify the language in S3.B.3(e)(i)(7) to state clearly that the permittee is to meet this requirement by implementing the BMPs in Volume 4 of the Ecology Stormwater Manual titled 'BMPs for Illicit Connections to Storm Drains' or the equivalent. Alternatively, if this is not Ecology's intent, state clearly what the permittee is supposed to do.

Justification: S3.B.3(e)(i)(7) does not specify what the permittee is supposed to do, but it seems probable that Ecology wants the permittee to implement the BMP referenced above. In any case, the permittee should not have to guess at the steps required for compliance.

S4 - Sampling

COMMENT 17

In S4.B.1, why have the sampling requirements changed from quarterly to four times during the wet season October 1 – June 30? With the condition to wait until results have been received from the previous sample event prior to taking the next, there are years that this timing will invite non-compliance.

S6 – Discharges to 303(d)-Listed or TMDL Waters

COMMENT 18

Modify S6.A.2 to clarify with which requirements applicants must comply, when their stormwater discharges to a 303(d) listed waterway. As currently drafted, this condition S6.A.2 relies on the November 4, 2005, 303(d) list; however, the next sentence states that:

For Permittees that apply after the effective date of this permit, the most recent 303(d) list that has been approved by EPA at the date the applicant's first application for coverage is received by Ecology.

This condition is confusing and appears to attempts to incorporate new permit terms after Ecology issues the permit.

Justification. This special condition is confusing and creates a moving target regarding the status of the receiving water and what effects that status will have on permit requirements. Also, it appears to require applicants to comply with later-enacted 303(d) lists that are created after the effective date of the general permit. This requirement would constitute an illegal permit modification because it denies permittees their right to

due process. Permits can be modified only through the procedures set forth in 173-226-230 WAC, which contains an appeal process (including a specific period of time within which appeals must be made). When Ecology revises the 303(d) list, or any other document referenced in the permit, and wants to incorporate the revised document as a condition in an NPDES permit, it must modify the permit in accordance with state rules.

COMMENT 19

Delete the second sentence of S6.A.2.

Justification: This paragraph establishes permit requirements for future permittees based on documents that do not exist, and the imposition of documents written in the future would constitute an illegal modification of permit conditions. Further, such an act would violate the rights of present and future permittees to due process of appeal, since it is impossible to appeal a condition that does not exist. Permits can be modified only through the procedures set forth in Chapter 173-226-230 WAC, which contains an appeal process (including a specific period of time within which appeals must be made). If Ecology issues a TMDL and wants to institute relevant portions of it as a condition in an NPDES permit, it must modify the permit in accordance with state rules. This issue has been resolved in the municipal permit development process.

COMMENT 20

Delete or revise condition S6.C.4(f) that states Ecology "may require permittees to sample for fecal coliform if there is evidence that they are a source of this pollution."

Justification: This condition fails to set forth under what circumstances or what types of evidence would be sufficient to require an industrial discharger to monitor for fecal coliform. Especially troubling is the lack of specificity of what constitutes acceptable evidence. For example, water quality data must meet the requirements and assurances set forth in Chapter 90.48 RCW. Ecology must describe with particularity what evidence is acceptable to trigger the requirements of this condition.

Finally, requiring a permittee to monitor for fecal coliform would require a permit modification that must occur consistent with state law and rules. General permit can be modified only through the procedures set forth in 173-226-230 WAC, which contains an appeal process (including a specific period of time within which appeals must be made).

COMMENT 21

Delete from the second sentence of S6.G.1 the following language: “or which have been completed prior to the date that the Permittee’s application is received by Ecology, whichever is later.”

Justification: This paragraph establishes permit requirements for future permittees based on documents that do not exist, and the imposition of documents written in the future would constitute an illegal modification of permit conditions. Further, such an act would violate the rights of present and future permittees to due process of appeal, since it is impossible to appeal a condition that does not exist. Permits can be modified only through the procedures set forth in 173-226-230 WAC, which contains an appeal process (including a specific period of time within which appeals must be made). If Ecology issues a TMDL and wants to institute relevant portions of it as a condition in an NPDES permit, it must modify the permit in accordance with state rules. This issue has been resolved in the municipal permit development process.

COMMENT 22

Change S6.G.2 to read as follows: “TMDL requirements associated with TMDLs completed after the issuance date of this permit will only become effective if they are imposed through an administrative order issued by Ecology.”

Justification: This paragraph establishes permit requirements for future permittees based on documents that do not exist, and the imposition of documents written in the future would constitute an illegal modification of permit conditions. On the other hand, Ecology can change the conditions for a single permittee on a case-by-case basis by issuing an administrative order.

S7 - Inspections

COMMENT 23

Revise conditions S7.A.1 and S7.C.1 so they are consistent with the requirements set forth in the Fact Sheet that require monthly visual inspections and visual inspections each time a sample is taken. (Fact Sheet at 45).

Justification: These conditions are unclear. They imply that permittees must sample during every storm event, and are inconsistent with requirements set forth in the Fact Sheet. Compliance standards should be clearly stated.

COMMENT 24

Delete S7.D.1(c).

Justification: The existing language attempts to unlawfully transfer the obligation for determining permit compliance from Ecology to the permittee, and would require a permittee to make a statement that could bring exposure to excessive liability and which has no legal significance. The permittee is obligated to perform inspections and prepare a report of results in accordance with the requirements in S7. It is the obligation of Ecology to determine permit compliance based on this report, and this obligation cannot be shifted to the permittee. This is an unresolved issue in the current appeal of the NPDES Construction Stormwater General Permit issued by Ecology on November 6, 2005.

S8 – Corrective Actions

COMMENT 25

Revise all sections of S8 so that references to BMPs use only the types of BMPs defined in Appendix 2 - Definitions.

Justification: This section uses the term ‘operational source control BMPs’ which is not defined, and is thus confusing.

COMMENT 26

Revise all sections of S8 to clarify that Ecology is in effect requiring two tiers of action from the permittee:

- Tier 1 – evaluate the need for non-capital BMPs and implement them as needed to achieve permit compliance, and
- Tier 2 – evaluate the need for capital BMPs if the use of non-capital BMPs does not achieve compliance with the permit.

References to different types of BMPs must be limited to those defined in Appendix 2 – Definitions.

Justification: The intent seems clear, but S8 as written is confusing.

COMMENT 27

Condition S8.A.1(a) is too broad because it requires permittees to identify and evaluate possible sources of pH by evaluating possible upstream pH sources. Clarify that permittees must only evaluate upstream sources located within their ownership.

Justification: This condition is too broad because upstream sources are not confined to those associated with the facility. Ecology cannot require permittees to commit trespass on private property to evaluate upstream sources of pH.

COMMENT 28

Revise S8.D.1 to properly describe the contents of the engineering report required, including a definition of the term 'AKART analysis' as used in S8.D.1(a).

Justification: S8.D.1 requires the permittee to prepare an engineering report in accordance with Chapter 173-240-130 WAC. This chapter pertains to engineering reports prepared for industrial wastewater facilities, and contains numerous requirements that might not be relevant for industrial stormwater permittees. Also, the term 'AKART analysis' does not appear in this chapter, nor is it defined in the industrial stormwater permit.

COMMENT 29

In the second sentence of S8.D.2, change "Level Three" to "Level Four."

Justification: Typographical error.

COMMENTS ON GENERAL CONDITIONS

COMMENT 30

General condition G19 appears to apply to construction activity. Consider either deleting or revising the condition.

Justification: The reporting requirements do not seem to apply and therefore should not be required.

COMMENT 31

G23.B inappropriately limits consideration of an appeal of general permit conditions of an individual discharger to the general permit's applicability or nonapplicability to that discharger. Delete the second sentence of paragraph G23.B.

Justification: The section as written is inappropriately limits the ability of permittees who obtain coverage after the initial appeal period for the permit has ended.

COMMENTS ON RELATED DOCUMENTS

COMMENT 32

In Appendix 2, modify the definition of "Applicable TMDL" to include only TMDLs completed before the issuance date of this permit.

Justification: This paragraph establishes permit requirements based on documents that do not exist, and the imposition of documents written in the future would constitute an illegal modification of permit conditions. Further, such an act would violate the rights of present and future permittees to due process of appeal, since it is impossible to appeal a condition that does not exist. Permits can be modified only through the procedures set forth in 173-226-230 WAC, which contains an appeal process (including a specific period of time within which appeals must be made). If Ecology incorporates a TMDL that EPA approves after the NPDES permit is issued, Ecology must modify the permit in accordance with state rules.

COMMENT 33

In Appendix 2, in the definition of the term "Operational BMPs," replace the last sentence with the following text: "The term 'operational BMPs' excludes BMPs that require construction or modification of any physical structures or features of the permitted facility. This exclusion applies to any such BMPs in the 2005 Ecology Stormwater Manual for Western Washington, even if that document designates any such BMP as 'operational'."

Justification: Volume 4 of the 2005 Ecology Stormwater Manual includes BMPs that are designated "operational" but would involve construction or physical facility modifications. For example, "installation of engineered soil/landscape systems" is listed as an operational BMP for Landscaping and Lawn/Vegetation Management. The BMPs for Roof/Building Drains at Manufacturing and Commercial Buildings include implementation of "source control measures such as air pollution control equipment, ..., process changes, etc." under "Applicable Operational Source Control BMPs." The

proposed definition in the permit would clarify the set of operational BMPs required under the permit regardless of confused language in the Manual.

COMMENT 34

In Appendix 2, either revise or delete the definition of “Significant Amount.” The phrase could be revised by deleting the phrase “that is amenable to available and reasonable methods of prevention or treatment, or. . . .”

Justification: The term “amenable” is vague and does nothing to quantify what is a significant amount of a pollutant. Conceivably, any pollutant is amenable to reasonable methods and treatment, whereas the remainder of the sentence makes it clear that it is a pollutant with a reasonable potential to cause a violation of water-quality standards.